IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-850

BLACK MUSICIANS OF PITTSBURGH, et al., individually and on behalf of all other persons similarly situated, *Petitioners*,

v.

LOCAL 60-471, AMERICAN FEDERATION OF MUSICIANS, AFL-CIO and AMERICAN FEDERATION OF MUSICIANS, AFL-CIO, *Respondents*.

MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

HENRY KAISER
RONALD ROSENBERG
VAN ARKEL, KAISER, GRESSMAN, ROSENBERG & DRIESEN
1828 L Street, N.W.
Washington, D. C. 20036

HAROLD GONDELMAN
BASKIN, BOREMAN, WILNER, SACHS, GONDELMAN & CRAIG
Frick Building, 10th Floor
Pittsburgh, Pennsylvania 15219

Attorneys for Respondents

Of Counsel:

RICHARD D. GILARDI, ESQ.
GILARDI & COOPER
606 Oliver Building
Pittsburgh, Pennsylvania 15222

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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The petition urges only that the courts below erred in applying the law to the facts and raises no legal issues warranting certiorari. Petitioner misconstrues the purposes of certiorari jurisdiction in arguing that this Court should provide him yet a third review of facts that two courts have found unpersuasive.[1] Petitioners admittedly boycotted the union's elections but now insist that their lack of representation in the local's officialdom is the product of discrimination. Rejection of the extraordinary contention that a party

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[1] Petitioners' Brief to the Court of Appeals made clear that their contentions were factual, Brief for Appellant, p. 13. Summary affirmance was particularly appropriate since Petitioners challenged factual findings.

that has refused to participate in the electoral process is entitled to such office by judicial fiat raises no substantial issue of law requiring review by this Court.

The trial court found, following years of intensive discovery and a full trial, "... that there has been no evidence presented to the court that the unions, either the National or the Local, are discriminating against the plaintiffs at this time." Opinion of District Court, 11a. In rejecting Petitioners' contentions, the trier of fact specifically found that the President of defendant Local "... has been fair to all concerned and has been doing his best to wipe out discrimination." *Ibid.* Petitioners proferred no evidence of present discrimination nor of present effects of past discrimination below and present no contention of such discrimination here. These critical factual findings by the trial court were not rebutted in the Court of Appeals or the petition for certiorari.

Petitioners had enjoyed five years of guaranteed representation voluntarily provided by the defendants. The merger took place more than eleven years ago and judicially mandated representation is clearly inappropriate so long after the merger. Indeed, the transitional protection plaintiffs obtained at the time of merger by defendants' voluntary act was far longer than that ordered by any court in any previous case and itself expired more than six years ago. Defendant International had been sued by formerly white locals who claimed that even transitional protections so limited in time violated the mandates of the Landrum-Griffin Act and other statutes. See *Local 10, AFM* v. *AFM,* 57 LRRM 2227 (N.D. Ill. 1964); *cf. Musicians Protective Union Local No. 274, AFM* v. *American Federation of Musicians,* 329 F. Supp. 1226 (E.D. Pa.

1971). Contrary to Petitioners' contentions, therefore, they had been the beneficiaries of extraordinary efforts to ease the difficulties of merger. Further extension of guaranteed representation for an indefinite period of time, as urged by Petitioners, promotes separation not integration and was properly rejected by the courts below.

Petitioners' claims that the absence of present black officers is attributable to alleged past discrimination were specifically rejected. Rather, the trial court found that Petitioners had engaged in "... boycotting the elections by inaction or non-attendance at meetings." Opinion of District Court, 10a. In addition, the District Court found that Petitioners had urged one black candidate who enjoyed wide support "... to ease up in his effort lest he would win and thus destroy (their legal) argument ..." *Ibid.* 10a.[1a] The courts below therefore properly found that Petitioners' wounds were self-inflicted and capable of healing by the simple act of running for election.[2]

Petitioners refuse to seek election but insist that this Court must mandate guaranteed offices for them for an indefinite period of time. Petitioners insist upon a judicial rather than an electoral victory. They ask this Court to order that offices be provided on the basis of color—an order compelling discrimination expressly prohibited by the statute,[3] one that would be

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[1a] Petitioners acknowledge that they had successfully pressured other blacks to boycott the local's elections. Pet. p. 7.

[2] The District Court found that "... the record shows that black members can win election ... (,)" 12 a, but had not by reason of the boycotting and refusals to participate.

[3] 42 U.S.C. § 2000e-2(j), *cf. Chance* v. *Board of Examiners,* — F.2d —, 11 FEP Cases 1451 (2d Cir. 1976).

totally unprecedented [4] and would require this Court to ignore its own admonition that questions of remedy rest in the sound discretion of the district courts. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 770, 779 (1976).

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

HENRY KAISER
RONALD ROSENBERG
VAN ARKEL, KAISER, GRESSMAN,
ROSENBERG & DRIESEN
1828 L Street, N.W.
Washington, D. C. 20036

HAROLD GONDELMAN
BASKIN, BOREMAN, WILNER,
SACHS, GONDELMAN & CRAIG
Frick Building, 10th Floor
Pittsburgh, Pennsylvania 15219

Attorneys for Respondents

Of Counsel:

RICHARD D. GILARDI, ESQ.
GILARDI & COOPER
606 Oliver Building
Pittsburgh, Pennsylvania 15222

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[4] The cases Petitioners cite as permitting a judicial order of guaranteed representation are totally inapposite. Petition, p. 9. No court has ordered guaranteed representation where the original merger was voluntary as it was here; nor has any court ordered guaranteed representation for more than two years following a court imposed merger. Petitioners enjoyed five years of guaranteed representation by Respondents' voluntary act and their demand for judicially mandated offices without elections for an indefinite period of time seeks relief never granted before.